an accomplice or coconspirator has fled or escaped since the commission of the crime, and that a reward has been offered for his arrest.

[Ed. Note.—For other cases, see 3 Va.-W. Va. Enc. Dig. 136.]

3. Criminal Law (§ 1169 (7)*)—Admission of Evidence of Flight of Accomplice Held Harmless.—In a prosecution for breaking and entering a railroad car and stealing household goods, where horse and vehicle of accused were seen on the night of the breaking coming from the direction of the car, attended by two men, one of whom was recognized as the accused by a witness for the state, held, that any error of the court in admitting evidence of flight and reward offered for the arrest of accomplice was harmless; the case against the accused being fully and completely made out.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 659.]

4. Criminal Law (§ 742 (1)*)—Credibility of Witnesses for Jury.—It is the pure province of the jury to determine the credibility of the witnesses and the weight to be given their testimony.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 73.]

5. Burglary (§ 41 (1)—Conviction for Breaking and Entering Railroad Car Sustained by Evidence.—In a prosecution for breaking and entering a railroad car and stealing household goods of the value of several hundred dollars, evidence held sufficient to sustain a conviction.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 662.]

Error to Circuit Court, Campbell County.

Oscar Burford was convicted of breaking and entering a railroad car and stealing therefrom household goods of the value of several hundred dollars, and brings error. Affirmed.

Duncan Drysdale and *L. Bradford Waters,* both of Lynchburg, for plaintiff in error.

John R. Saunders, Atty. Gen., and *J. D. Hank, Jr., Asst. Atty. Gen.,* for the Commonwealth.

JARRELL *v.* COMMONWEALTH.

Jan. 19, 1922.

[110 S. E. 430.]

1. Homicide (§ 127*)—Indictment for First or Second Degree Murder May Be in Common-Law Form.—An indictment for murder in the common-law form is good as an indictment for murder in the first degree, and also for murder in the second degree.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 418.]

2. Indictment and Information (§ 121 (2)*)—No Error in Failing to Require Commonwealth to File Bill of Particulars.—Accused has right to have commonwealth file a bill of particulars only where it is neces-

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

sary to supply the fault of generality or uncertainty in the averments in the indictment, and there was no fault or generality or uncertainty in an indictment in the common-law form, expressly and distinctly charging accused with the throwing of a rock which gave a mortal wound, as a principal in the first degree, and joined as defendants in the same count two others as participants in the killing, also charged as principals in the first degree.

[Ed. Note.—For other cases, see 7 Va. W. Va. Enc. Dig. 406.]

3. Indictment and Information (§ 125 (40)*)—Indictment Charging One with Being Both Principal and Accessory Held Proper.—An indictment in common-law form, charging accused jointly with others with the throwing of a rock which killed deceased, which it was physically possible only for one of them to have done, was not defective because it charged the accused with two offenses, committing the crime as a principal in the first degree and committing it as an accessory, it being permissible to charge both offenses in such manner.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 445.]

4. Criminal Law (§ 1186 (4)*)—Irregularity in Drawing Names of Veniremen Must Be Shown to Have Caused Injustice.— It cannot be said that the court erred in refusing to quash the venire on the ground that names of the veniremen were drawn in the presence of two citizens called upon by the clerk without it appearing from the record that the presence of the commissioner in chancery could not be obtained as required by statute, where there was no evidence tending to show that the irregularity probably caused any injustice to the commonwealth or to the accused, in view of Acts 1920, c. 23.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 29.]

5. Homicide (§ 166 (2)*)—Evidence of Difficulty between Deceased and Third Party Held Admissible to Show Motive.—In a prosecution for homicide, evidence of a difficulty between deceased and a third party prior to the killing was properly admitted where one of the principal issues in the case was whether or not the accused committed the homicide in retaliation for the conduct of the deceased in the difficulty between him and the third party.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 140.]

6. Homicide (§ 233*)—Evidence Held to Show Motive Was Retaliation for Conduct of Deceased in Difficulty with Third Party.—In a prosecution for homicide, where accused assaulted deceased and killed him with a rock, evidence held sufficient to sustain a finding that accused committed the homicide in retaliation for conduct of the deceased in a difficulty between him and a third party.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 149.]

7. Criminal Law (§ 424 (1)*)—Declaration of Coconspirator after Killing Inadmissible.—A declaration of coconspirator after the object

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

of the conspiracy, a murder, had been accomplished, that, if accused had not killed deceased, he would, was erroneously admitted.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 331.]

8. Criminal Law (§ 1169 (7)*)—Admission of Declaration of Co-conspirator in Evidence Held Not Prejudicial.—In a prosecution for murder, erroneous admission in evidence of declaration of coconspirator after the killing that, if accused had not killed deceased, he would was not prejudicial where there was evidence that such coconspirator expressed the intent to kill the deceased prior to the killing, and the jury found accused only guilty of murder in the second degree, which was evidently based on other testimony in the case.

[Ed. Note.—For other cases, see 3 Va.-W. Va. Enc. Dig. 136.]

9. Criminal Law (§ 665 (4)*)—Rebuttal Evidence of Witness Excluded from Courtroom, but Listening at Window, Is Admissible.—Testimony of witness in rebuttal, who listened to the evidence through a window after he had been excluded from the courtroom with other expected witnesses, was properly admitted in evidence.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 955]

10. Criminal Law (§ 423 (3)*)—Declaration of Accomplices Held Admissible.—Declarations of accomplices when going to deceased for the purpose of assaulting him, in retaliation for his conduct in a difficulty with a third party, were admissible.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 331.]

11. Homicide (§ 338 (2)*)—Statement of Deceased Prior to Killing Held Harmless.—In a prosecution for the killing of one in retaliation for his conduct in a prior difficulty with a third person, a statement made by deceased after the first difficulty, "If I run now, will always have to run," was either immaterial or had such a remote bearing on the homicide involved that its introduction in evidence could not have prejudiced accused.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 139.]

12. Homicide (§ 340 (4)*)—Error in Instruction on First Degree Murder Harmless on Conviction of Second Degree.—Any errors in instructions with respect to murder in the first degree were harmless where the jury found accused guilty of murder in the second degree, in the absence of some special circumstance indicating that the jury were influenced in their verdict by such error.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 745.]

13. Homicide (§ 286 (1)*)—Instruction as to Intent Held Not Objectionable as Being Abstract and Misleading.—In prosecution for homicide, where accused killed deceased by striking him with a rock, an instruction "that the rule of law is that a man shall be taken to intend that which he does, or that which is the necessary consequence of his act," held not objectionable as being abstract and misleading.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 728.]

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

14. Homicide (§ 295 (2)*)—Instruction as to Provocation Held Proper under Evidence.—Where there was evidence to show that killing was in retaliation for conduct of deceased in a prior difficulty with a third person, court did not err in charging "that a mortal wound given with a deadly instrument in the previous possession of the slayer, without any or upon very slight provocation, is prima facie murder, and throws upon the accused the necessity of proving extenuating circumstances."

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 601.]

15. Homicide (§§ 268, 325*)—Too Late on Appeal to Raise Question whether Rock Is Deadly Weapon, although Such Question May Be One of Fact.—Whether a weapon is a deadly weapon may, under some circumstances, become a question of law and fact to be determined by the jury, but an accused who killed deceased with a rock, and asked for an instruction containing the assumption that the rock was a deadly weapon, and the trial having proceeded with that assumption on both sides, cannot for the first time on appeal raise the question as to whether or not the rock was a deadly weapon.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 560.]

16. Criminal Law (§ 829 (1)*)—Covered Instructions Properly Refused.—There was no error in refusing instructions requested by accused which were covered by instructions given at the request of the commonwealth.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 604.]

17. Homicide (§ 341*)—Refusal of Instruction Concerning Flight Held Harmless.—In a prosecution for homicide, where testimony for commonwealth concerning the arrest of accused showed merely that he had enlisted as a soldier, and was at camp when arrested, and that his being there was ascertained by a sheriff through a letter of the accused to his father, stating that he wanted to come and stand trial, accused was not harmed by refusal to instruct that, if the accused left the county and joined the army pursuant to a purpose formed before killing the deceased, and because the accused believed he was in danger of death or great bodily harm at the hands of the relatives and friends of deceased, then they could not consider such flight as evidence against him.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 604.]

18. Criminal Law (§ 785 (16)*)—Court Should Not Instruct Jury that They May Disregard Testimony of Certain Witnesses if They Knowingly Testified Untruthfully.—The court should not instruct the jury that, if they believed that certain named witnesses knowingly testified untruthfully on any material matter in the case, they are at liberty to disregard the whole of their testimony, because such in-

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

struction may be given in the discretion of the trial court only if couched in general terms.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 601.]

19. Criminal Law (§ 778 (4)*)—Instruction as to Susceptibility of Fact to Two Interpretations Held Erroneous.—The court erred in charging that, where a fact is "equally" susceptible of two constructions, one of which is consistent with the innocence of the accused, they cannot arbitrarily adopt that interpretation which incriminates him; use of the word "equally" being proper in a civil case, but in a criminal case.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 600.]

20. Criminal Law (§ 1172 (2)*)—Error in Instruction Held Harmless.—Error of court in charging that, where a fact is "equally" susceptible of two interpretations, one of which is consistent with the innocence of the accused, the jury cannot arbitrarily adopt that interpretation which incriminates him, was harmless where it in no way appeared that the verdict was influenced thereby.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 602.]

21. Homicide (§ 254*)—Evidence Held to Warrant Conviction of Murder in the Second Degree.—In a prosecution for a killing occurring in a fight in which a number of persons took part, deceased being hit on the head with a rock, evidence held to warrant accused's conviction of murder in the second degree.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 153.]

22. Criminal Law (§ 1134 (3)*)—Assignment of Error in Overruling Bail Held to Present Moot Question.—A conviction of murder in the second degree being affirmed as against other assignments of error, an assignment that the trial court erred in overruling application of accused for bail presented a purely moot question, unnecessary to be decided.

Burks, J., dissenting.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 215.]

Error to Circuit Court, Madison County.

Herman Jarrell was convicted of murder in the second degree, and brings error. Affirmed.

Will A. Cook, of Madison, for plaintiff in error.

John R. Saunders, Atty. Gen., and *J. D. Hank, Jr., Asst. Atty. Gen.,* for the Commonwealth.

BUTLER *v.* COMMONWEALTH.

March 16, 1922.

[110 S. E. 868.]

1. Parent and Child (§ 17 (2)*)—Father Not Liable for Willful Refusal to Support Children Taken Away, without Reasonable Excuse by His Wife.—In a prosecution, under Code 1919, §§ 1936, 1937, for